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Supreme Court of the United States.

Brief Of National Association for Gun Rights As Amicus Curiae in Support of Respondent and Affirmance

2023 WL 6535183 | UNITED STATES OF AMERICA, Petitioner, v. Zackey RAHIMI, Respondent. | Supreme Court of the United States. *(Approx. 20 pages)*

v.

Zackey RAHIMI, Respondent.

No. 22-915.
October 2, 2023.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief Of National Association for Gun Rights As Amicus Curiae in Support of Respondent and Affirmance

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*1 INTEREST OF *AMICUS*

The right to keep and bear arms is a fundamental right that existed prior to the Constitution. The right is not in any sense granted by the Constitution. Nor does it depend on the Constitution for its existence. Rather, the Second Amendment declares that the pre-existing "right of the people to keep and bear Arms shall not be infringed." The National Association for Gun Rights ("NAGR")[1] is a nonprofit membership and donor-supported organization with over 240,000 members nationwide. The sole reason for NAGR's existence is to defend American citizens' right to keep and bear arms. In pursuit of this goal, NAGR has filed numerous lawsuits seeking to uphold Americans' Second Amendment rights. NAGR has a strong interest in this case because the guidance the Court will provide in its resolution of this matter will have a major impact on NAGR's ongoing litigation efforts in support of Americans' fundamental right to keep and bear arms.

SUMMARY OF ARGUMENT

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Court instructed inferior courts to stop their decade-long practice of treating the Second Amendment as a second-class right. 142 S. Ct. at 2156. Some lower courts got the message. Unfortunately, many inferior courts failed to *2 heed this admonition and have entered rulings manifestly at odds with *Bruen's* plain holding. The purpose of this brief is to

request the Court to use the opportunity presented by this case to address and resolve these mistakes in the following areas:

1. *Bruen's* step one "plain text" analysis is based on the text. It is not an empirical inquiry.

2. The Court should once again make clear that the right to keep and bear arms protected by the Second Amendment is not a second-class right.

3. The "common use" inquiry focuses on whether an arm is commonly possessed by American citizens.

4. The relative "dangerousness" of a weapon is irrelevant if the weapon is commonly possessed for lawful purposes.

5. "Corpus linguistics" analysis remains unfruitful in the Second Amendment context.

6. All American citizens are among "the people."

7. Inferior courts must stop injecting backdoor means-end scrutiny into their Second Amendment analysis.

8. The Founding era is the critical time for determining the meaning of the Second Amendment.

9. Commonly possessed arms are protected even if they are also useful in military service.

*3 ARGUMENT

A. Introduction.

In *Bruen*, the Court instructed inferior courts to stop their decade-long practice of treating the Second Amendment as a second-class right. *Id.*, 142 S. Ct. at 2156. Some lower courts got the message. Unfortunately, many did not. One tries to give these courts' decisions a charitable reading and assume their failure to follow *Bruen* is due to a faulty understanding of the principles announced in that case. But whether from recalcitrance or inadvertence, the fact remains that in the 15 months since *Bruen*, numerous lower courts have issued rulings manifestly at odds with *Bruen's* plain holding. Accordingly, NAGR requests the Court to use the opportunity of this case to provide guidance to those courts regarding the correct application of its Second Amendment precedents.

B. The "plain text" analysis is not an empirical inquiry.

Bruen states that "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*, 142 S. Ct. at 2129-30 (internal citation and quotation marks omitted).

As the phrase "plain text" implies, the issue at this step is the meaning of the constitutional text. *See D.C. v. Heller*, 554 U.S. 570, 584 (2008) ("At the time *4 of the founding, as now, to 'bear' meant to 'carry.'"); and *Bruen*, 142 S. Ct. at 2134-35 (the definition of "bear" encompasses public carry and the "plain text thus presumptively guarantees petitioners ... a right to 'bear' arms in public for self-defense"). It should be obvious that an analysis of the text is not an empirical inquiry. For example, the text extends, prima facie, to all "bearable arms" such as the firearms at issue in this case. *Heller*, 554 U.S. at 582. It would seem, therefore, that if a plaintiffs conduct is keeping or bearing a firearm, the plain text ipso facto covers that conduct and no further inquiry is necessary under step one.

Unfortunately, some courts see the matter differently. Instead of ending the textual inquiry at the text, they have grafted an empirical element onto the "plain text" step.[2] For example, the court below wrote:

The amendment grants [defendant] the right to keep firearms ... And it is undisputed that the types of firearms that Rahimi possessed are in common use, such that they fall within the scope of the amendment.... Thus, *Bruen's first step is met* ...

United States v. Rahimi, 61 F.4th 443, 454 (5th Cir. 2023) (citations and quotation marks omitted; cleaned up; emphasis added).

The Fifth Circuit erroneously assumed that Rahimi was required to prove his firearms were in ***5** common use to show they were covered by the "plain text."[3] It is important to clear up this confusion, because courts have denied Second Amendment claims on the ground that the plaintiffs did not jump through several empirical hoops that have nothing to do with the text of the amendment. In *Nat'l Ass'n for Gun Rts. v. Lamont*, 2023 WL 4975979 (D. Conn. Aug. 3, 2023), for example, the plaintiffs challenged Connecticut's ban on AR-15 and similar rifles. It would seem obvious that a rifle is a bearable arm and thus keeping and bearing one is covered by the plain text. Not so according to the court. Instead, the court held that under the "plain text" step plaintiffs are required to prove the following empirical facts: [1] that the specific firearms they seek to use and possess are in common use for self-defense, [2] that the people possessing them are typically law-abiding citizens, and [3] that the purposes for which the firearms are typically possessed are lawful ones. *Id.* at *15.[4] This is ***6** wrong because, as *Bruen* made clear, the common use issue arises under the history and tradition step:

> Drawing from this *historical tradition*, we explained there that the Second Amendment protects only the carrying of weapons that are those 'in common use at the time,' as opposed to those that are 'highly unusual in society at large.'
>
> *Id.*, 142 S. Ct. at 2143 (*quoting Heller*, 554 U.S. at 627) (emphasis added).

The Court held that as between (a) arms in common use and (b) arms that are highly unusual, under the *historical tradition* only the former are protected by the Second Amendment. This is true because regulations from the Founding era did "not remotely burden the right of self-defense as much as an absolute ban" on a weapon in common use. *Id.*, 554 U.S. at 632.[5] Contra *Lamont*, the Court has never held that only arms in common use are "arms" within the meaning of the plain text in the first place. Indeed, the Court held just the opposite when it stated the Second Amendment extends, prima facie, to *"all* [] bearable arms." *Heller*, 554 U.S. at 582 (emphasis added).

In summary, the plain text of the Second Amendment extends to all bearable arms, but historical tradition allows the government to ban some bearable arms. For example, a prohibition on a "dangerous and unusual" firearm does not violate the Second Amendment because laws banning such ***7** weapons existed in 1791 and have been in place ever since. *Id.* A dangerous and unusual firearm is not protected by the Second Amendment, but no one would argue that because it is unprotected it is not a bearable arm in the first instance.

This distinction is not unique to the Second Amendment. For example, on its face, the First Amendment prohibits all laws abridging freedom of speech. But a law proscribing "true threats" does not violate the right to free speech because the Nation's "historical and traditional" regulation of speech has countenanced such laws from "1791 to the present." *Counterman v. Colorado*, 143 S. Ct. 2106, 2113-14 (2023). Thus, while a "true threat" is not protected by the First Amendment, no one would argue that it is not speech in the first instance. *Bruen* held that this same First Amendment conceptual framework applies in Second Amendment cases. 142 S. Ct. at 2130.

Thus, under *Bruen*, if a plaintiff shows she desires to possess a bearable arm (such as an AR-15 semi-automatic rifle), the plain text step is satisfied, and the Constitution presumptively protects the plaintiffs conduct. The burden then shifts to the government to defend its law by demonstrating that the rifle is in the category of "unusual" arms that may be banned. *See Teter* at 949-50). If the government fails to show the rifle is "unusual," the law banning it must be declared unconstitutional. The plaintiff does not have the burden of showing that it is in common use in step one.

***8** C. Once more from the top: the right to keep and bear arms protected by the Second Amendment is not a second-class right.

Most of the *amici* supporting the government were laser-focused on the procedural issue - i.e., did Rahimi get notice and an opportunity for a hearing before his Second Amendment rights were stripped away? Surely this misses the point. Yes, due process is vitally important, but it must always be kept in mind that procedural fairness is a minimum requirement of the law. No process - no matter how evenhanded and regular - will rescue an otherwise unconstitutional statute. That this is not glaringly obvious to the government and its *amici* is testament to the fact that many continue to think of the right to keep and bear arms as a second-class right.

The statute at issue in this case applies to anyone who is the subject of an order that does no more than prohibit him from threatening the use of physical force. 18 U.S. C. § 922(g)(8)(C)(ii). There is no requirement that the court make a finding that the person actually made such a threat in the past, intends to make such a threat in the future, or even that he has the ability to carry a threat out if he were to make it. That the government's *amici* are satisfied with - even applaud - the fact that under the statute a person can be stripped of his fundamental constitutional rights on such flimsy grounds betrays a mindset that does not really consider the right to keep and bear arms as a right to take seriously, much less defend vigorously.

***9** That this mindset pervades the arguments of the government and its *amici* is easy to demonstrate. Suppose Congress were to enact a statute parallel to § 922(g)(8)(C) that provides as follows:

> Any person who is subject to a court order that by its terms explicitly prohibits the threatened use of physical force against an intimate partner must allow the police to search his residence at any time for any reason or no reason. The police need not establish probable cause for any such search.

Almost certainly it would never occur to the government or its *amici* to argue that a person has nothing to complain about so long as he has notice and a hearing before entry of a court order that serves as the basis for stripping him of his fundamental right to be free from unreasonable searches. What is the difference? The difference is that § 922(g)(8)(C)(ii) violates what is, in their view, the second-class Second Amendment right; whereas the hypothetical statute violates a first-class Fourth Amendment right that is worth defending.

This same mindset plagues the so-called Red Flag laws that have recently been enacted in many states, as observed by the court in *R.M. v. C.M.*, 79 Misc. 3d 250, 189 N.Y.S.3d 425 (N.Y. Sup. Ct. 2023). In that case the court compared New York's treatment of respondents under its Red Flag law to its treatment of respondents under its involuntary hospitalization statute and found the comparison to be very telling. The New York Red Flag law required the court to enter an order depriving a person of his Second ***10** Amendment rights if it determined that he "is likely to engage in conduct that would result in serious harm to himself, herself or others, as defined in ... section 9.39 of the mental hygiene law." *Id.*, 189 N.Y.S.3d at 426-27. The court noted that the law allowed it to make this determination without the input of a single mental health professional. New York law also allows a court to order a person to be involuntarily hospitalized if it makes the exact same determination required by the Red Flag statute (i.e., that he is "is likely to engage in conduct that would result in serious harm"). But in stark contrast to the Red Flag law, a court may make this determination only based on a physician's certification, and a second physician must agree if the hospitalization lasts longer than 48 hours. *Id.* The court held the Red Flag law unconstitutional because it did not treat the Second Amendment right to keep and bear arms with the same dignity as the Fourth Amendment right to be free from unreasonable seizures. *Id.* The good news is that the New York court got it right in this case. The bad news is that similar Red Flag laws that relegate Second Amendment rights to second-class status are proliferating around the country. That legislatures are passing these laws with such apparent insouciance suggests that it is important for the Court to reemphasize its prior holding that the fundamental right to keep and bear arms must not be treated with any less deference than other fundamental rights.

***11** **D. "Common use" is a function of common possession.**

As discussed above, a Second Amendment plaintiff is not required to show that a weapon is in common use at the plain text step. To be sure, however, the plaintiff will usually want to introduce such evidence because if a plaintiff shows that the banned arm is in common use, it will be impossible for the government to meet its burden under the historical tradition step. This is true because if a plaintiff shows a weapon such as an AR-15 rifle is in common use, it necessarily means the government will not be able to show the rifle is in the category of "unusual" arms that may be banned under the Nation's historical tradition.

Unfortunately, some courts have raised the "common use" bar so high that it is all but impossible for plaintiffs to surmount. These courts have done this by interpreting *Heller* to mean that plaintiffs must show far more than that a weapon is owned by millions of

Americans for lawful purposes. Instead, they require plaintiffs to show that Americans commonly use that specific weapon in actual instances of self-defense. Thus, for example, evidence that tens of millions of AR-15 rifles are owned by law-abiding citizens is, according to these courts, insufficient to show common use. See, e.g., *Nat'l Ass'n for Gun Rts. v. Lamont*, 2023 WL 4975979, at *19, *22 (D. Conn. Aug. 3, 2023).

This is wrong because whether an arm is in common use is determined by whether it is commonly possessed by law-abiding citizens for lawful purposes. ***12** In *Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039 (2015), Justice Thomas put the matter as follows: "Roughly five million Americans own AR-style semiautomatic rifles ... The overwhelming majority of citizens who own and use such rifles do so for lawful purposes ... Under our precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons." *Id.* (Thomas, J., and Scalia, J., dissenting from denial of certiorari) (emphasis added). Thus, "all that is needed" for a plaintiff to have a right under the Second Amendment to keep a particular arm is to show that millions of them are owned and used for lawful purposes. *See also* *Heller v. D.C.*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (millions of AR-15s sufficient to show common use); *Kolbe v. Hogan*, 849 F.3d 114, 153 (4th Cir. 2017) (Traxler, J., dissenting) (same); *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (Alito, J. concurring) (relevant statistic is how many are owned by citizens).

This makes sense, because in *Heller* the Court did not focus on "use" in isolation. It also held the Second Amendment protects an individual right to *keep* and bear arms. *Id.*, 554 U.S. at 595 (emphasis added). The Court noted that "keep arms" means "possessing arms" (*Id.*, 554 U.S. at 583), and banning "the most preferred firearm in the nation to *keep* and use for protection of one's home and family [fails] constitutional muster." *Id.*, 554 U.S. at 628-29 (cleaned up; emphasis added). The word "keep" in that sentence is not superfluous. The Second Amendment protects both the right to possess (i.e., keep) arms and the right to use those arms should the occasion arise. ***13** This means that to be constitutionally protected, it is enough that the arms in question are commonly possessed for self-defense and other lawful purposes.

This Court has never hinted (much less held) that for an arm to be protected it is necessary for a plaintiff to show that the weapon's use in actual self-defense situations meets some arbitrary threshold. *Heller* was decided on a motion to dismiss record. The Court did not require an empirical showing regarding actual use of handguns. Rather, it simply listed some of the reasons why Americans "may prefer" handguns. For example, a defender can dial a phone with one hand while holding the gun with the other hand. *Id.*, 554 U.S. at 629. *Heller* offered no empirical data about actual defensive handgun use - such as whether anyone has ever actually dialed a phone with one hand while holding a handgun in the other. Instead, the Court concluded: *"Whatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition on their use is invalid." *Id.* (emphasis added).

In *Bruen*, the Court picked up where *Heller* left off. The Court stated that the Second Amendment protects the right to *"possess* and carry weapons *in case of* confrontation." *Bruen*, 142 S. Ct. at 2134 (internal citations and quotation marks omitted; emphasis added). The right encompasses the right to be *"armed and ready* for offensive or defensive action in a case of conflict with another person." *Id.* (internal citations and quotation marks omitted; emphasis added). The right thus encompasses the right to "'keep' firearms ... at the ready for self-defense ... *beyond moments of actual confrontation." Id.*

***14** Making it all but impossible for plaintiffs to establish common use would frustrate the Court's clear purpose in *Bruen*. Accordingly, NAGR hopes the Court will provide guidance regarding this issue.

E. The relative "dangerousness" of an arm is irrelevant.

As discussed above, *Heller* created a binary between weapons in common use that may not be banned and certain "unusual" weapons that may be banned. *Id.*, 554 U.S. at 627. One category of unusual weapons that may be banned is "dangerous and unusual" weapons. As Justice Alito observed in *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016), this is "a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual." *Caetano v. Massachusetts*, 577 U.S. 411, 418 (2016) (emphasis in the

original). Thus, "the relative dangerousness of a weapon is irrelevant" if it is commonly used for lawful purposes. *Id.*

In *Bevis v. City of Naperville, Illinois*, 2023 WL 2077392 (N.D. Ill. Feb. 17, 2023), the court specifically found that "assault weapons"[6] are *not* unusual. *Id.*, at *16. Nevertheless, according to the court, they are not protected by the Second Amendment because they are "particularly dangerous." *Id.* Surely this is incorrect. All weapons are dangerous. And if Second Amendment protection hangs on whether a reviewing court decides to hang the epithet "particularly" onto ***15** "dangerous" to describe the weapon, the Second Amendment is rendered toothless.

F. Expert Opinions based on corpus linguistics are still "worthy of the Mad Hatter."

Certain professors offered expert opinions in *Heller* based on the "corpus linguistics" approach to analyzing the text of the Second Amendment. Justice Scalia rejected these opinions out of hand, characterizing them as "worthy of the Mad Hatter." 554 U.S. at 589. Nothing has changed. In *Ocean State Tactical, LLC v. State of Rhode Island*, 2022 WL 17721175 (D.R.I. 2022), the court cited Professor Dennis Baron's corpus linguistics work to support its holding that ammunition and "parts" of weapons (such as triggers and magazines) are not arms as the word is used in the Second Amendment and are therefore completely devoid of constitutional protection. *Id.* at *13. This conclusion is obviously wrong. If *Ocean State* were correct, a state could effectively disarm all of its citizens. While it could not make possession of an assembled firearm illegal, it could outlaw ammunition and all vital parts. An interpretation of the Second Amendment that, carried to its logical conclusion, completely nullifies the right to use firearms is obviously inconsistent with *Bruen.*

G. All people are people.

In *Heller* the Court started its analysis with the "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans." *Id.*, 554 U.S. at 581. Later it held that notwithstanding the fact that the right belongs to all ***16** Americans, the government has the power to strip certain persons of that right so long as the law doing so is supported by history and tradition. 554 U.S. at 626 (certain longstanding prohibitions are valid).[7]

Applying these principles in the context of *Bruen's* two-step analysis results in the same conclusion. Under the "plain text" step, the plain meaning of "the people" is just that, all of the people. This leads to the presumption that every American has the right to keep and bear arms. *Heller*, 554 U.S. at 581. The burden then shifts to the government to rebut that presumption by demonstrating that a law denying the right to certain Americans (e.g., the mentally ill) is consistent with the Nation's history and tradition of firearm regulation.

Prior to *Bruen*, there was a debate as to the proper role of history and tradition in this context. As summarized by now-Justice Barrett, "one [approach] uses history and tradition to identify the scope of the right, and the other uses that same body of evidence to identify the scope of the legislature's power to take it away." *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019), *abrogated by Bruen* (Barrett, J. dissenting). *Bruen* settled that debate. *"Bruen* makes clear that the first step is one based solely on the text of the Second Amendment." ***17** *United States v. Harrison*, 2023 WL 1771138, at *4 (W.D. Okla. Feb. 3, 2023). History and tradition come in only at the second step. *Id.*

Some courts do not seem to understand this. For example, the panel in *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir.), *reh'g en bane granted, opinion vacated*, 72 F.4th 1346 (11th Cir. 2023), stated that *Bruen's* plain text step has two components, one of which focuses on the text and one of which focuses on history and tradition. 61 F.4th at 1321. The panel then wrote that under *"Bruen's* first step, it's not clear whether 18-to-20-year-olds are part of the people whom the Second Amendment protects." 61 F.4th at 1324 (internal quotation marks omitted). The panel wrote that this was unclear because history and tradition revealed that young adults did not enjoy certain civil rights in the Founding era. *Id.*

The panel's approach to *Bruen's* first step is surely incorrect,[8] because to the very extent the analysis turns from the text to anything else (including history and tradition), the analysis is focused on something other than the "plain text." Indeed, what is the point of having a second "history and tradition" step if considerations of history and tradition control at the plain text step?

In summary, the analysis under the "plain text" step is, as its name suggests, based solely on the text. Any analysis of history and tradition is reserved for step two. This has important implications. For example, in the context of laws banning young adults ***18** from acquiring firearms, the plain text step is vastly simplified. Say what one will about the merits of young men as a group, it is hard to argue they are not people.

H. Stop trying to sneak interest balancing in through the back door.

In *Nat'l Ass'n for Gun Rts. v. Lamont*, 2023 WL 4975979 (D. Conn. Aug. 3, 2023), the court upheld Connecticut's assault weapons ban. The court rested its decision in part on its conclusion that "the suitability of these weapons for crime *outweighs* the limited evidence Plaintiffs presented on the use of these weapons for self-defense." *Id.* at *23 (emphasis added). The court essentially held that the means Connecticut employed (banning an arm) serves a salutary end (increasing public safety) that "outweighs" the plaintiffs' interest in exercising their constitutional right to self-defense. This is astonishing, because it flies in the face of *Bruen's* central holding abolishing means-end scrutiny in Second Amendment cases. *Bruen* held that "[t]o justify its regulation, the government *may not simply posit that the regulation promotes an important interest.* Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126 (emphasis added).

Perhaps anticipating pushback, *Bruen* emphasized its rejection of means-end scrutiny by repeating it over and over: *Heller* does "not support applying means-end scrutiny in the Second Amendment context." *Id.*, at 2127. *"[Heller]* did not ***19** invoke any means-end test." *Id.*, at 2129. *"[Heller]* expressly rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* (internal citations and quotation marks omitted). "[T]he Second Amendment does not permit - let alone require - judges to assess the costs and benefits of firearms restrictions under means-end scrutiny." *Id.* (cleaned up). "We declined to engage in means-end scrutiny because the very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Id.* (cleaned up). "We then concluded [that a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id. "Heller* specifically ruled out the intermediate-scrutiny test." *Id. Heller* "expressly rejected" the dissent's "'interest-balancing inquiry."' *Id.* (internal quotation marks omitted). In summary, it is impossible to come away from even a cursory reading of *Bruen* and not understand that means-end scrutiny is no longer allowed in Second Amendment cases. Yet that is exactly what *Lamont* did.

In *Bevis v. City of Naperville, Illinois*, 2023 WL 2077392, at *14 (N.D. Ill. Feb. 17, 2023), the district court also engaged in means-end scrutiny, but it did so through slightly more subtle means. The court held that the historical "analogues" advanced by the government support banning weapons that pose a danger to public safety even if the weapons are not ***20** unusual. *Id.*, at *14-16. Therefore, according to the court, banning weapons with such public safety implications is consistent with the Nation's history and tradition of firearms regulation. *Id. Bruen* warned against this very tactic. The Court wrote that "whether modern and historical regulations impose a comparable burden on the right of armed self-defense" is a central consideration when engaging in an analogical inquiry. *Id.*, 142 S. Ct. at 2133. But it also said: "This does *not* mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry." *Id.*, n. 7 (emphasis added). It follows logically that courts are also forbidden from engaging in interest-balancing in the guise of apply the "balance of equities" factor when determining whether an injunction is an appropriate remedy. *See Bevis*, at *17 (State's public safety interest outweighs loss of right to bear arms). NAGR hopes the Court will use this opportunity to once again emphasize that means-end scrutiny (under whatever guise it appears) is not permitted in the Second Amendment context.

I. The Founding era is the critical time for constitutional analysis.

In *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317 (11th Cir.), *reh'g en banc granted, opinion vacated*, 72 F.4th 1346 (11th Cir. 2023), the panel began its step two analysis by writing: "We begin by explaining why historical sources from the Reconstruction Era are more probative of the Second Amendment's scope than those from the Founding Era." The panel then went on to hold that Florida's decision to strip young adults of their Second

Amendment rights is consistent with the Nation's history and tradition of firearms regulation. ***21** *Id.* at 1325. The panel was able to reach this conclusion, however, only because it considered certain mid- to late-19th-century laws as relevant analogues. *Id. See also Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 2023 WL 3355339 at *21, n. 44 (E.D. Va. May 10, 2023). The panel clearly erred when it considered these later laws to the exclusion of Founding-era precedent. *See Fraser* at *22 (pointing to laws from more than a half-century after ratification does not discharge the burden that *Bruen* imposes on the government).

Fraser's rejection of these later laws is consistent with *Bruen*, where the Court noted that "not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them.*'" *Id.*, 142 S.Ct at 2136 (*citing Heller*, 554 U.S. at 634-35) (emphasis in the original). The Court cautioned against "giving postenactment history more weight than it can rightly bear." *Id.*, 142 S.Ct. at 2136. And "to the extent later history contradicts what the text says, the text controls." *Bruen*, 142 S.Ct. at 2137 (citation omitted). In examining the relevant history that was offered in *Bruen*, the Court noted that "[a]s we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Bruen*, 142 S.Ct at 2137 (*citing Heller*, 554 U.S. at 614). It is true that *Bruen* noted an "ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment ***22** was ratified in 1868 when defining its scope ... " *Id.*, 142 S.Ct. at 2138. At the same time, however, the Court noted that it had "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.*, 142 S.Ct. at 2137 (citations omitted).

It is important for the Court to reemphasize that evidence from the second half of the 19th century has little relevance to an inquiry into the original public meaning of the Second Amendment, which was enacted six decades earlier. *Bruen*, 142 S. Ct. at 2153-54 ("As we suggested in *Heller*, [] late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence."). The Court expressed this concept even more forcefully in *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2257-2258 (2020), where it held that laws enacted in the second half of the 1800s - even if enacted by the overwhelming majority of states - are not relevant to the "history and tradition" inquiry regarding the scope of a provision of the Bill of Rights. In that case, the plaintiff challenged a Montana regulation that excluded religiously affiliated private schools from a state scholarship program for students attending private schools. The Court held that the law was unconstitutional because there was no Founding-era tradition supporting Montana's decision to disqualify religious schools from government aid. *Id.*, 140 S. Ct. at 2258. Far from prohibiting such aid, Founding-era laws actively encouraged it. *Id.* Significantly, ***23** Montana pointed out that in the latter half of the 1800s the overwhelming majority of states (30) had enacted no-aid laws. *Id.*, 140 S. Ct. at 2259. The Court rejected Montana's argument, holding that "[s]uch a development, of course, cannot by itself establish an early American tradition.... [S]uch evidence may reinforce an early practice but cannot create one ... The no-aid provisions of the 19th century hardly evince a tradition that should inform our understanding of the Free Exercise Clause." *Id.*

Espinoza's holding is unsurprising, because the Court has always treated the time of the ratification of the Bill of Rights as the key historical period for understanding the scope of those rights - regardless of whether the Court was applying the Amendments against the federal government or against the states. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 42-50 (2004); *Virginia v. Moore*, 553 U.S. 164, 168-68 (2008); *Nevada Comm'n on Gaming Ethics v. Carrigan*, 564 U.S. 117, 122-25 (2011); *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984).

A second problem with the *Bondi* panel's approach is that it leads to results that directly conflict with *Bruen's* admonition "that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Id.* 142 S. Ct. at 2137. *See also McDonald v. Chicago*, 561 U.S. 742, 765 (2010) (incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal ***24** encroachment); and *Ramos*

v. Louisiana, 140 S. Ct. 1390, 1397 (2020) ("incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government"). As *Fraser* noted, there is absolutely no support for the age restriction in the Founding era. *Id.* at *22. *Bondi* reached a different conclusion only by relying on laws enacted around 1868 when the 14th Amendment was ratified. *Id.*, 61 F.4th at 1325. *Bondi's* approach conflicts with *Bruen* because under the panel's approach, the text of the Second Amendment would mean one thing when applied to federal laws (as in *Fraser*) and the opposite thing when applied to state laws (as held by the panel in *Bondi).*

In summary, the Founding era, not the mid- to late 19th century, is key for understanding the scope of the Bill of Rights. *See* Mark W. Smith, *"Not all History is Created Equal": In the Post-Bruen World, the Critical Period for Historical Analogues is when the Second Amendment was Ratified in 1791, and not 1868* (2022), available at bit.ly/3Xwtgze (last visited June 1, 2023), in which Professor Smith engages in an exhaustive analysis of the numerous Supreme Court cases regarding this issue. For all of these reasons, NAGR hopes the Court will firmly assert that the Founding era is the relevant timeframe for an analysis of the meaning of the Bill of Rights, including the Second Amendment.

***25 J. Commonly possessed arms are protected even if they could be used in military service.**

In *Heller*, the Court wrote: "It may be objected that if weapons that are most useful in military service - M-16 rifles and the like - may be banned, then the Second Amendment right is completely detached from the prefatory clause."[9] *Id.*, 570 U.S. at 627. In *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *abrogated by Bruen*, the court latched onto this passage and held that all weapons that are "like" weapons that might be used by the military are riot protected, and since AR-15 rifles are like M-16 rifles they are unprotected. 849 F.3d at 136.

Even though *Kolbe* was specifically *abrogated* by *Bruen*, in *Hanson v. D.C.*, 2023 WL 3019777, (D.D.C. Apr. 20, 2023), the court cited *Kolbe* for the proposition that arms like AR-15 rifles that are "useful" for military purposes are not protected by the Second Amendment. *Kolbe* was wrong on this point, and it follows that *Hanson* was too. In context, the full passage in *Heller* from which *Kolbe* quoted shows that this Court meant the exact opposite of what *Kolbe* said it meant.

In *United States v. Miller*, 307 U.S. 174 (1939), the Court noted that when called for military service, militia members were expected to appear bearing arms supplied by themselves of the kind in common use at the time. Thus, *Heller* held that *Miller* supported the conclusion that the Second Amendment ***26** protects weapons in common use. *Heller*, 570 U.S. at 625-26. Then, in the passage quoted by *Kolbe*, the Court wrote:

> It may be objected that if weapons that are most useful in military service - M-16 rifles and the like - may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of *lawful weapons that they possessed at home to militia duty.* It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated *arms that are highly unusual in society at large.* Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. 570, 627-28 (emphasis added).

In context, it is clear that in this passage the Court was contrasting two categories of weapons: (1) sophisticated military arms (M-16s, bombers, tanks) that are "highly unusual in society at large," and (2) weapons in common use such as those a militia member would bring for military service. The former is not protected by the Second Amendment. The latter is. But this does not mean that a weapon is ***27** unprotected merely because it may be used in a military context. Indeed, it would be extremely anomalous if *Heller* were interpreted to

mean that (1) weapons in common use brought by a militia member for military service are protected by the Second Amendment, but at the same time (2) all weapons useful for military service are not protected by the Second Amendment. This nonsensical result is not what the Court had in mind in *Heller.* Rather, *"Miller* and *Heller* [merely] recognized that militia members traditionally reported for duty carrying 'the sorts of lawful weapons that they possessed at home,' and that the Second Amendment therefore protects such weapons as a class, regardless of any particular weapon's suitability for military use." *Caetano v. Massachusetts*, 577 U.S. 411, 419 (2016) (Alito, J., concurring). The misunderstanding of *Heller* propagated in *Kolbe* lingers and continues to do damage to this day. NAGR hopes the Court will use the opportunity posed by this case to clear the record on this issue once and for all as Justice Alito attempted to do in *Caetano.*

CONCLUSION

For the reasons set forth herein, NAGR respectfully requests the Court to address the many errors and misapplications of its Second Amendment precedent that have continued to arise after *Bruen.*

***28** Respectfully submitted this 2nd day of October 2023.

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Footnotes

1 No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

2 An "empirical textual analysis" would seem to be a contradiction in terms, but this is what some courts have required.

3 The court's error did not have a practical effect in this case because common use was not disputed. 61 F.4th at 454.

4 *Lamont* is not isolated. Perhaps the most egregious example of a court narrowing the scope of the plain text to breathtakingly narrow proportions occurred in *Nat'l Ass'n for Gun Rts., Inc. v. City of San Jose*, 2023 WL 4552284 (N.D. Cal. July 13, 2023), a challenge to a city law forcing gun owners to buy insurance as a condition of possessing a firearm. The court held the plain text does not cover the conduct of possessing a firearm for home defense "without the burden of insuring liability for firearm-related accidents." *Id.* at *6. Whether history and tradition support imposing an insurance burden can be debated (it does not). But the Constitution is silent on the issue of insurance, and thus it should be obvious the issue cannot be resolved by the "plain text." *See Bruen*, 142 S. Ct. at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction").

5 *See Teter v. Lopez*, 76 F.4th 938, 949-50 (9th Cir. 2023) (*Heller* did not say unusual weapons are not arms; it said the historical tradition supports a prohibition on carrying them).

6 "Assault weapon" is a politically charged smear used by anti-gun activists to describe certain popular semi-automatic rifles like the AR-15. *Stenberg v.*

Carhart, 530 U.S. 914, 1001 n. 16 (2000) (Thomas, J., dissenting).

7 Of course, this analysis starting with the plain text and followed by consideration of history and tradition prefigures *Bruen.* This is not surprising because *Bruen* stated it was not announcing a new test but merely reiterating the test set forth in *Heller.* 142 S. Ct. at 2129.

8 The panel was also incorrect in its conclusion that young adults do not have Second Amendment rights for the reasons set forth in *Fraser v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 2023 WL 3355339 (E.D. Va. May 10, 2023).

9 The Court went on to explain why this was not a problem for its conclusion. *Id.*

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